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No. 99-1848

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In The Supreme Court of the United States

BUCKHANNON BOARD AND CARE HOME, INC.; THE WEST VIRGINIA RESIDENTIAL BOARD AND CARE HOME ASSOCIATION; DORSEY PIERCE; and on behalf of all others similarly situated,

Petitioners,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES, *ET AL.*,

Respondents.

ON PETITION FOR A *WRIT* OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A *WRIT* OF *CERTIORARI*

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PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Petition for a Writ of Certiorari has been filed with this Court seeking review of the Fourth Circuit's per curiam opinion refusing to consider the Petitioners' request for attorney's fees under the "catalyst theory." This Court should now review this case in order to resolve a conflict between the Circuits, with regard to the continuing validity of the "catalyst theory," and to clarify the language in this Court's decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, __ U.S. __, 120 S.Ct. 693, 145 L.Ed. 2d 610 (2000). The decision in *Friends of the Earth* implies that the "catalyst theory" remains a viable mechanism to collect attorney's fees in appropriate cases but this Court did not ultimately decide that issue. This case presents this Court with a perfect opportunity to resolve this conflict between the Circuits regarding the "catalyst theory" and therefore, this Court should accept the Petition for review.

The Respondents West Virginia State Fire Commission, the Office of the State Fire Marshal, the West Virginia Department of Health and Human Resources ("DHHR"), and the Office of Health Facility Licensure and Certification ("OHFLAC") have now filed two separate briefs in opposition to the Petition for a Writ of Certiorari.[1] The two briefs argue

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[1] At the outset, the Petitioners note for this Court's attention that, no briefs have apparently been filed on behalf of the eighteen named state officials sued in this matter. *See* Petition, List of Parties at ii.

that this Court should not consider the Petition for a Writ of Certiorari because: 1) the Eleventh Amendment deprives this Court of any jurisdiction to consider this matter on appeal; 2) the Court of Appeals for the Fourth Circuit correctly decided *S-1 and S-2 v. State Board of Education*, 21 F.3d 49 (4th Cir.)(en banc), *cert. denied*, 513 U.S. 876, 115 S.Ct. 205, 130 L.Ed.2d 135 (1994); and, 3) this case does not provide an appropriate vehicle to consider the "catalyst theory" since it involves legislative enactments related to the removal of the "self preservation" regulations.

Contrary to the arguments of the Respondents, the Eleventh Amendment is not an impediment to this Court's jurisdiction in this matter because: 1) the Eleventh Amendment was not properly raised in the district court below, and therefore, based upon this Court's precedent, it has been waived by the Respondents; 2) this was an action for prospective declaratory and injunctive relief against individual state officers under *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908); and, 3) this Court has heretofore determined that a motion for attorney's fees is not precluded under the Eleventh Amendment.

The Petitioners also refute the Respondents arguments that *S-1 and S-2* was correctly decided in light of the ten other Court of Appeals that have continued to recognize the validity of the "catalyst theory" in appropriate cases. The validity of that argument is further called into question in light of this Court's recent decision in *Friends of the Earth*. Finally, the

argument of the Respondents that the Petitioners' Motion for Attorney's fees is not factually supported is premature at best. This Court should now accept this Petition to review the validity of the Fourth Circuit's continued rejection of the "catalyst theory." The remainder of this Reply Brief will now review each of these arguments in more detail.

A. The Eleventh Amendment does not deprive this Court of Jurisdiction to consider this Petition.

1. The Respondents have failed to properly raise the Eleventh Amendment as a defense in this action.

The Respondents West Virginia State Fire Commission and the Office of the State Fire Marshal have now raised before this Court, for the first time on appeal, the issue that this Court has no jurisdiction to consider the Petition because of the Eleventh Amendment. While an affirmative defense based upon the Eleventh Amendment was raised by these two parties in their Answer to the original complaint, no party ever raised the Eleventh Amendment in response to the Amended Complaint filed in this action.[2]

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[2] A review of the docket sheet with the clerk's office reveals that on December 30, 1996, the Petitioners moved to file an Amended Complaint (Docket No. 26). An Order allowing the Amended Complaint was entered on February

Contrary to the arguments of the Respondent State Fire Marshal and State Fire Commission, this Court has previously ruled that the Eleventh Amendment is not a jurisdictional matter as it may be waived if not raised by the State. *Wisconsin Department of Corrections v. Schacht*, 524 U.S. 381, 389, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998); *Patsy v. Board of Regents of Florida*, 457 U.S. 496, 515, n.19,102 S.Ct. 2557, 73 L.Ed.2d 172 (1982). In this case, it was not raised appropriately by the Respondents at any stage below, and therefore, this Court should consider that it has been waived.

7, 1997 and the Amended Complaint was filed as of that date (Dockets No. 31 and 32). On March 10, 1997, the Respondents filed a Response to the Amended Complaint that incorporated by reference their prior Motions to Dismiss and Motions for Summary Judgment (Docket No. 39). None of these pleadings raised an Eleventh Amendment defense. The Respondents' Motions to Dismiss were granted in part and denied in part by an Order dated February 19, 1998 (Docket No. 58). Thereafter, in accordance with Rule 12(a)(4)(B), the Respondents should have filed answers to the Amended Complaint by March 2, 1998. However, the issue of mootness then arose as a result of the actions of the West Virginia Legislature and, instead of filing an answer, the Respondents all filed Motions for a Stay on March 4, 1998 (Docket No.63) and then additional Motions to Dismiss and for Summary Judgment were filed in May, 1998 (Dockets No. 69 and 70) which were ultimately granted and the case was dismissed as moot. None of these pleadings raised a defense based upon the Eleventh Amendment.

To the extent that this Court would allow the Eleventh Amendment to be raised for the first time on appeal, it should be recognized that this position has only been advanced by two of the twenty-two named Respondents in this Civil Action. Therefore, there can be no argument that these other parties who have not raised the Eleventh Amendment have waived it at this stage of the proceedings and this Court has jurisdiction as to those parties to consider the Petition filed in this case.[3]

2. This action arises under the *Ex Parte Young* exception to the Eleventh Amendment.

It is well-established that the Eleventh Amendment does not bar a lawsuit to enjoin a state official from an ongoing violation of federal law. *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). *See also, Green v. Mansour*, 474 U.S. 64, 68, 106 S.Ct. 423, 88 L.Ed.2d 371 (1985). The

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[3] It is beyond the scope of this Reply Brief to fully respond to the Respondent State Fire Marshal and State Fire Commission's Eleventh Amendment arguments. It appears that as of this time, this Court has not ruled that an action against a state under either the FHAA or the ADA is precluded by the Eleventh Amendment. As the Respondents recognize in their brief, the ADA Eleventh Amendment issue is before this Court this term in *University of Alabama Board of Trustees v. Garrett*, No. 99-1240. The Petitioners would contend that no ruling that the Eleventh Amendment precludes actions under the FHAA or ADA should be made until the parties have the opportunity to fully brief the issue.

Petitioners assert that their underlying claims against the Respondents for violations of the Federal Fair Housing Amendments Act of 1988 ("FHAA"), 42 U.S.C. §§ 3601, *et seq.* and Titles II and III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12132 and 12182 are not barred by the Eleventh Amendment because they fall squarely within the doctrine of *Ex Parte Young*. Specifically, Petitioners filed the underlying action seeking prospective injunctive relief[4] against seventeen state officials in order to end continuing violations of the FHAA and the ADA.[5] In this regard, the Petitioners asked the District Court to enjoin DHHR, OHFLAC, the Fire Commission, the Fire Marshal, their agents,

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[4] In the Amended Complaint, Petitioners sought monetary damages against the state agencies and individual defendants. Subsequently, the parties filed a stipulation with the United States District Court for the Northern District of West Virginia stating that the Petitioners would not seek punitive and compensatory damages as originally requested in the Amended Complaint. *See*, Stipulation filed on January 2, 1998 (Docket No. 46).

[5] As noted in footnote one, *supra*, the Briefs filed on behalf of the Respondents neglect to acknowledge their respective representation of the seventeen state officials that the Petitioners sued in their individual capacities. These individuals include: 1) the Secretary of the West Virginia Department of Health and Human Resources; 2) the Director of the Office of Health Facility Licensure and Certification ("OHFLAC"); 3) a Program Manager for OHFLAC; 4) the West Virginia Fire Marshal; and, 5) thirteen West Virginia State Fire Commissioners.

and employees, and successors, from enforcing the challenged "self preservation" regulations against the Petitioners. The Petitioners further asked the District Court to enter a declaratory judgment that the challenged regulations were preempted by the FHAA and the ADA. In light of the nature of the underlying civil action, the Respondents reliance on the Eleventh Amendment as a basis to argue that this Court has no jurisdiction to consider the Petition is misplaced.[6]

3. Attorney's Fees are allowed under the Eleventh Amendment.

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[6] It is recognized that this Court has held that the exception in *Ex Parte Young* will not apply when a detailed remedial scheme exists in the legislation. *See e.g. Seminole Tribe v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 714 (1996). In *Seminole Tribe*, the State and Governor moved to dismiss the matter based upon the Eleventh Amendment. This Court held, *inter alia*, the *Ex Parte Young* doctrine inapplicable to lift the Eleventh Amendment bar to suit against a state, even though the Tribe sought prospective relief against a state official in his individual capacity, because Congress had provided a detailed remedial scheme in 25 U.S.C. § 2710(d)(7)(A). In contrast to the statutory provision at issue in *Seminole Tribe*, Congress did not provide any sort of detailed remedial scheme in the FHAA and the ADA. Rather, the enforcement provision of these federal civil rights statutes simply make available to private parties basic equitable relief. *See* 42 U.S.C. § 3613(c)(1); 42 U.S.C. § 12133 and 42 U.S.C. § 12188(a)(1).

Finally, this Court has previously recognized that a Motion for Attorney's Fees is to be treated as ancillary prospective relief and therefore, not precluded by the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678, 695 n. 24, 98 S.Ct. 2565, 57 L.Ed. 2d 522 (1978); *See also, Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.E 2d 229 (1989). The issue before the Court at this time is the validity of the "catalyst theory" and whether it allows the Petitioners' Motion for Attorney's Fees. Given this Court's prior rulings that the Eleventh Amendment does not apply to such Motions for attorney's fees, this Court need not consider the jurisdictional arguments of the Respondent State Fire Marshal and State Fire Commission at this time.

B. The Court of Appeals for the Fourth Circuit did not properly decide *S-1 and S-2*.

The Respondents DHHR and OHFLAC contend that the Court of Appeals for the Fourth Circuit properly decided *S-1 and S-2* and therefore, this Court should not consider this Petition. The Petitioners do not agree with this argument and they stand on the arguments in the original Petition. The Petitioners argue that *S-1 and S-2* is not properly decided in light of the ten other Courts of Appeals that continue to allow attorney's fees under the "catalyst theory." *See* pages 18-22 of the Petition. This argument is further bolstered by this Court's decision in *Friends of the Earth, supra*. This Court should

accept the Petition to resolve the split within the Circuits and to further clarify the discussion in *Friends of the Earth, supra*.[7]

C. This Court should decide the legal issue regarding the validity of the "catalyst theory" without regard to the factual issues raised by the Respondents.

The Respondents State Fire Marshal and State Fire Commission have raised a factual defense in their Brief, stating that this case is not a good case to consider the "catalyst theory" because the change in the "self preservation" regulations was a result of legislative action. This argument is disingenuous at best, given the fact that the State Fire Marshal initiated this change in the regulations a mere six weeks after he was deposed in this case, and after he had personally thwarted the adoption in West Virginia of Chapters 22 and 23 of the Life Safety Code for eleven years. *See* Petition at pages 6-7 and n. 4.

In any event, there has never been any factual development of this issue, as the district court was precluded by the Court of Appeals decision in *S-1 and S-2* from considering

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[7] It is noted that at least one Court of Appeals has recognized this Court's discussion in *Friends of the Earth, supra*, that there is a split in the Circuits, but it continued to adhere to the "catalyst theory." *Holmes v. Millcreek Township School District*, 205 F.3d 583 at n. 13, (3rd. Cir. 2000)

the Motion for Attorney's Fees. In *Friends of the Earth, supra* this Court held that it was "for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees." 120 S.Ct. at 712. This Court should now accept the Petition and hold as a matter of law that the "catalyst theory" remains a viable means to collect attorney's fees and allow the matter to be fully developed in the district court.

CONCLUSION

This Court should grant *certiorari* to review the Fourth Circuit's decision in this matter and in *S-1 and S-2*. This Court should further remand this case to Chief Judge Frederick P. Stamp, Jr. with the United States District Court for the Northern District of West Virginia with instructions that he consider the Petitioners' Motion for Attorney's Fees.

Respectfully submitted,

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